LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
APR 7 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

* * *

NO. 1406

* * *

CHARLES ALLAN BROOM,
Petitioner

v.

STATE OF TEXAS,
Respondent

* * *

On Petition for Writ of Certiorari to
The Court of Criminal Appeals of Texas

* * *

RESPONDENT'S BRIEF IN OPPOSITION

* * *

CRAWFORD C. MARTIN
Attorney General of Texas
NOLA WHITE
First Assistant
ALFRED WALKER
Executive Assistant
ROBERT C. FLOWERS
Assistant Attorney General
LONNY F. ZWIENER
Assistant Attorney General
Attorneys for Respondent
Box 12548, Capitol Station
Austin, Texas 78711

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

* * *

NO. 1406

* * *

CHARLES ALLAN BROOM,

Petitioner

v.

STATE OF TEXAS,

Respondent

* * *

On Petition for Writ of Certiorari to
The Court of Criminal Appeals of Texas

* * *

RESPONDENT'S BRIEF IN OPPOSITION

* * *

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas, which is sought to be reviewed in this proceeding, is as yet unreported. The opinion is, however, appended to the Petition herein.

JURISDICTION

The formal jurisdictional requirements would appear to be satisfied in this case although Respondent disputes that any right guaranteed by the Constitution of the United States has been denied.

QUESTIONS PRESENTED

1. Was the warrantless arrest and search of Peti-

tioner unreasonable under the Fourth and Fourteenth Amendments to the United States Constitution where:

(a) The police officers had information from an anonymous informant that three hippie-type individuals were smoking marijuana at a particular place in a public park, and

(b) Police investigation disclosed the three hippie-types at the place in the park indicated and

(c) One of the persons (the Petitioner) was observed doing a dance with arms waving, prior to the arrest and subsequent search which disclosed marijuana in the possession of Petitioner?

2. Whether the State of Texas can constitutionally make criminal the private possession of marijuana?

STATEMENT OF THE CASE

Austin police officers received information by telephone that three hippie-type persons, two boys and a girl, were smoking marijuana in Pease Park on the hike and bike trail across from the Nob Hill Apartments. The information came from an unknown informant.

Three police officers investigated and saw three hippie-type, two men and a woman, in the Park on the trail at the place indicated. Two of the hippies were seated and Petitioner was dancing with arms extended, turning around and moving from side-to-side. One of the officers recognized Petitioner as a person arrested in 1967 on an indictment charging the illegal possession and the sale of LSD.

Acting on this confirmation of the information received, the officers arrested Petitioner and searched him finding a match box containing marijuana.

Petitioner was tried on a plea of not guilty before the trial court, found guilty and assessed a term of six years.

The judgment was affirmed by the Court of Criminal Appeals of Texas and these certiorari proceedings followed.

ARGUMENT AND AUTHORITIES

1. *The Arrest of Petitioner and the Search and Seizure Was Proper Under the Holding of this Court in Draper v. United States*

In *Draper v. United States,* 358 U.S. 307 (1959), a federal narcotics agent was told by an informant, who had in the past proved to be reliable, that Draper was selling narcotics. The agent was later informed that Draper had to go to Chicago to purchase heroin and would return by train on the morning of September 8th or 9th with the heroin. A description of Draper and his clothing was also given by the informant. A man, bearing the description given and wearing the clothes described, alighted from the train on the morning of September 9th carrying a zipper bag. He was arrested and the insuing search revealed that he was carrying heroin. This Court found that there was probable cause for the arrest and that the search was reasonable under the circumstances.

In the present case, the Austin police were told that three hippe-types were smoking marijuana in Pease Park. On going to the park, the police observed the three hippies and noted that Petitioner Broom was dancing around, an indication that he was under the influence of marijuana. One of the officers recognized Broom to be a person arrested for possession and sale of LSD in 1967 (the instant arrest occurred on February 6, 1969). As before noted, the search in the present

case revealed that Petitioner had marijuana in a match box.

The search here would appear to be reasonable under the doctrine announced by *Draper*. While in the present case the informant and his reliabality was not known (as opposed to the situation in Draper), the information furnished here was at least one factor upon which probable cause could be predicated. The subsequent police investigation disclosed the reliability of the information received. The police

(1). Found the three hippie-types at the location described.

(2). Petitioner's actions were consistent with one under the influence of marijuana, leading to the rather definite belief that he had recently been smoking the drug, and

(3). Petitioner was known to have been arrested earlier for the sale and possession of LSD, thus re-enforcing the belief that he was a person more likely to use marijuana than a person never involved with LSD.

In light of the foregoing circumstances, the arrest and search and seizure were reasonable under the United States Constitution. Although the informant's reliability was unknown here in contract with *Draper,* the verification of the informant's information in the instant case was stronger and more substantial. In addition to locating the persons described at the correct location (which was as far as the verification went in *Draper*), the officers in the present situation also verified to a large degree that Petitioner had, in fact been smoking marijuana because of his observed actions and because of his previous connection with LSD.

Accordingly, under the authority of *Draper,* the seizure of marijuana from Petitioner should be upheld as the product of a reasonable search.

2. *There Is No Constitutional Bar To A State's Forbidding The Private Possession of Marijuana*

The legislative branch of both the state and federal governments have wide latitude in defining what activity should be classified as criminal. 21 Am.Jur. 2d 95.

However, Petitioner, argues that, in the case of private possession of marijuana, the State is without the power to punish except through a showing of a compelling state interest.

This contention is without efficacy and was answered by this Court in *Stanley v. Georgia,* 394 U.S. 557 (1969), wherein it was observed at page 394, footnote 11,

> "What we have said in no way infringes upon the power of the State or Federal Government to make possession of other items, such as *narcotics,* firearms, or stolen goods, a crime. Our holding in the present case turns upon the Georgia statute's infringement of fundamental liberties protected by the First and Fourteenth Amendments. *No First Amendment rights are involved in most statutes making mere possession criminal.* (Emphasis supplied)."

There is, thusly, no merit in the contention that prohibiting the possession of marijuana violates any constitutional right.

CONCLUSION

For the reasons advanced above, Respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,
CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant

ALFRED WALKER
Executive Assistant

ROBERT C. FLOWERS
Assistant Attorney General

LONNY F. ZWIENER
Assistant Attorney General

Attorneys for Respondent
Box 12548, Capitol Station
Austin, Texas 78711

CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, attorney for Respondent, certify that a copy of the above and foregoing Respondent's Brief in Opposition has been served on Petitioner by placing same in the United States Mail, postage prepaid, to Petitioner's attorney, Mr. Sam Houston Clinton, 205 Texas AFL-CIO Bldg., Austin, Texas 78701, this the ____ day of April, 1971.

LONNY F. ZWIENER
Assistant Attorney General